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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. OMAR CABRERA, Defendant and Appellant.	F075531 (Super. Ct. No. 15CMS1347) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

Donn Ginoza, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon, Darren K. Indermill and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Omar Cabrera was charged with multiple offenses stemming from his engagement in sexual activity with a 12-year-old girl, identified herein as Jane Doe. Defendant was convicted by jury of the following nine offenses: one count of administering an intoxicant with the intent to commit a felony (Pen. Code, § 222)[1] (count 1); three counts of committing a lewd or lascivious act with a minor under the age of 14 years (§ 288, subd. (a)) (counts 2, 7 & 8); one count of attempting to commit a lewd or lascivious act with a child under the age of 14 years (§§ 664/288, subd. (a)) (count 4); one count of attempting to commit sodomy of a minor under the age of 14 years and more than 10 years younger (§§ 664/286, subd. (c)(1)) (count 5); one count of oral copulation of a minor under the age of 14 years and more than 10 years younger (former § 288a, subd. (c)(1))[2] (count 6); one count of contact or communication with a minor with intent to commit a lewd or lascivious act (§ 288.3, subd. (a)) (count 9); and one count of arranging to meet a minor for the purpose of engaging in lewd or lascivious behavior (§ 288.4, subd. (b)) (count 10). The jury also found true the burglary special circumstance allegation attached to count 8 (§ 667.61, subds. (c)(8), (e)(2)),[3] but found the kidnapping special circumstance allegation attached to count 4 not true and acquitted defendant of kidnapping a minor under the age of 14 years for the purpose of committing a lewd or lascivious act (§ 207, subd. (b)) (count 3).

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 Effective January 1, 2019, section 288a was renumbered to section 287. (Stats. 2018, ch. 423, § 49.)

3 As noted by the trial court, the verdict form for the burglary special circumstance finding under section 667.61, subdivisions (c)(8) and (e)(2), contained a clerical error in that it referred to section 667.61, subdivisions (c)(8) and (e)(1). The error was confined to misidentifying subdivision (e)(2) as subdivision (e)(1), however; the charging document was accurate, as were the instructions to the jury. (*People v. Webster* (1991) 54 Cal.3d 411, 447 ["[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice."]; accord, *People v. Camacho* (2009) 171 Cal.App.4th 1269, 1272–1273.)

The trial court sentenced defendant to an indeterminate term of 25 years to life in prison plus an additional determinate term of 16 years 8 months in prison, as follows. On count 8, the court sentenced defendant to an indeterminate term of 25 years to life pursuant to section 667.61, subdivision (j)(2).[4] The court imposed the upper term of eight years on count 2 and consecutive terms on the remaining counts as follows: terms of two years each on counts 6 and 7, terms of one year each on counts 4, 5, 9 and 10; and a term of eight months on count 1.

On appeal, defendant claims the trial court erred when it denied his motion challenging the excusal of potential Juror No. 295751 (D.E.), brought pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). He also claims the jury's burglary special circumstance finding is not supported by substantial evidence and the trial court erred in admitting a photograph of defendant with the victim when she was a baby. Finally, in supplemental briefing, defendant claims the trial court erred in failing to stay his sentences on counts 1, 9 and 10 under section 654.

The People concede the trial court erred in failing to stay the sentences on counts 9 and 10, but they disagree the court erred as to count 1, and they dispute defendant's entitlement to any relief on the other claims raised in this appeal.

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4 The trial court sentenced defendant to 25 years to life in prison pursuant to section 667.61, subdivision (j)(2). However, both the minute order from the sentencing hearing and the abstract of judgment erroneously reflect that defendant was sentenced to 25 years to life pursuant to subdivision (j)(2) of section 667.67, a nonexistent statute. A trial court's oral judgment controls and "[w]hen an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties." (*People v. Jones* (2012) 54 Cal.4th 1, 89.) As well, this court may correct on our own motion the purely clerical error in the minute order. (*People v. Contreras* (2009) 177 Cal.App.4th 1296, 1300, fn. 3; *People v. Williams* (1996) 50 Cal.App.4th 1405, 1408, fn. 2.)

We agree with the parties that the trial court should have stayed the sentences on counts 9 and 10 under section 654, but we otherwise reject defendant's claims and, except as modified with respect to counts 9 and 10, we affirm the judgment.

FACTUAL SUMMARY

I. Prosecution Case[5]

At the time of the crimes, Doe was 12 years old and was good friends with defendant's daughter, A.C., who was then 15 years old. Doe's and A.C.'s mothers were also close friends and had known one another since high school.

A. First Incident After Movie

Toward the end of February 2015, defendant, who was no longer together with A.C.'s mother, took A.C. and Doe to see a movie. Afterward, they stopped at a liquor store and defendant bought Mike's Hard Lemonade for the girls, which they began drinking in the car. The trio then went to an apartment that belonged to defendant's girlfriend, where they continued to drink. In addition to Mike's Hard Lemonade, Doe had two shots of vodka, which defendant poured, and a drink with Malibu and orange juice, which defendant mixed.

Doe became intoxicated and could barely stand up without assistance. She testified that she moved next to defendant on the couch, hugged him, ran her fingers through his hair and put her leg over him. After A.C. left to use the bathroom, defendant and Doe began kissing. Doe then pushed defendant off and told him, "[T]his is wrong, we can't do this." After A.C. returned and defendant then left to use the bathroom, Doe told A.C. she just "made out" with A.C.'s father. A.C. responded that Doe was drunk and "doing dumb stuff."

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5 Defendant was charged with committing the offenses between February 1, 2015, and April 30, 2015. At trial, Doe testified to an additional incident of touching that occurred on Easter 2015, but that incident was not charged and we confine our summary to those facts relevant to the charged offenses.

Defendant returned and then helped Doe to the bathroom. Doe testified she took defendant's hand and they went into the bedroom belonging to his girlfriend's son, where they started kissing and she tried to take his belt off. Doe testified that she felt defendant's penis inside her vagina. They then moved to defendant's girlfriend's bedroom at his suggestion and engaged in sexual intercourse a second time. After Doe looked at a clock and saw that it was getting late, she told defendant she needed to go because her mother was going to be worried.

Doe testified that after they dressed and left the room, she started to cry because she had just lost her virginity and knew it was wrong. As they walked out of the apartment, Doe told defendant she hated him. He did not respond and when A.C. asked him why Doe said that, he stated he did not know. When defendant returned to the apartment to retrieve Doe's cell phone charger and the two girls were alone in the car, Doe, who was still crying, told A.C. that she had lost her virginity to A.C.'s dad. Doe testified that she could tell from the look on A.C.'s face that A.C. did not believe her.

B. Avenal Incident

In March 2015, Doe's mother gave her permission to go to the beach for the weekend with defendant, A.C., and A.C.'s younger brother, O.C. Defendant, along with A.C. and O.C., picked Doe up at her house but, due to the time of day and defendant's need to pack, they went to the house defendant shared with his mother in a nearby town rather than leaving for the beach as planned. On the way to his house, defendant stopped at the liquor store and bought tequila and a drink called "X-Rated."

At the house, Doe and A.C. began drinking alcoholic beverages and they smoked some marijuana with defendant, which he provided. When defendant's mother and his sister arrived at the house, Doe and A.C. went to his bedroom so his mother would not see Doe. At some point, defendant's sister left and his mother went to her bedroom. Doe, A.C., O.C. and defendant were all lying on defendant's bed, where Doe testified they slept that night. Doe stated she was a bit intoxicated, but felt normal.

As defendant lay next to Doe on the bed, he began rubbing her vagina and inserting his fingers inside her. He next rubbed his penis between her buttocks before climbing on top of her and inserting his penis in her vagina. After several minutes of intercourse, defendant orally copulated Doe briefly. He asked Doe if she wanted to go into the other room and when she said no, he left.

C. Hotel Incident

The next morning, defendant, Doe, A.C. and O.C. traveled to Culver City and defendant rented a hotel room with two beds. That night, Doe and A.C. drank some alcohol and smoked some marijuana. Doe testified she felt a little "buzzed" and a little high. After A.C. fell asleep, defendant tugged on Doe's hand and they went into the bathroom together, where they engaged in sexual intercourse.

The next morning, while A.C. was in the shower and O.C. was on the floor watching television, defendant moved over to the bed Doe and A.C. had shared. He inserted his fingers inside Doe's vagina, but stopped when O.C. got up from the floor.

D. Last Incident at Doe's House

In April 2015, Doe was home alone while her mother was at a doctor's appointment. She and defendant exchanged text messages and mutually agreed defendant would come over while her mother was gone. Doe testified that after defendant arrived, they had sexual intercourse. Afterward, defendant kissed her and left.

At some point shortly thereafter, Doe's mother read a text message on Doe's phone from an unknown number and became suspicious. Doe eventually told her mother that defendant got her drunk and they had sex. Doe's parents then contacted law enforcement and defendant was arrested after Doe placed two pretextual phone calls to him.

II. Defense Case

Defendant's mother testified regarding the night Doe was at her house in Avenal. Contrary to Doe's testimony that she was in defendant's bedroom when his mother came

home and he did not want his mother to know she was there, defendant's mother stated that A.C., O.C. and Doe were in the kitchen making food when she arrived. She said that the three children slept in the bedroom A.C. and O.C. shared when they visited her, that she saw defendant go into his own bedroom and close the door, and that the children went to bed before she did. She testified that she noticed nothing unusual that night.

Perla Trejo, the investigator for the district attorney's office who had contact with Doe, also testified for the defense. Trejo stated that she interviewed Doe twice but for reasons she could not explain, only the first interview was recorded.

DISCUSSION

I. *Batson/Wheeler* Claim

A. Summary of Defendant's Claim

During jury selection, defendant brought a *Batson/Wheeler* motion as the prosecutor was in the process of exercising her sixth peremptory challenge to excuse potential juror D.E., a Hispanic male. During argument, defendant challenged the prosecutor's use of peremptory challenges to excuse D.E. and two other Hispanic men. On appeal, defendant limits his challenge to the excusal of D.E. Relying on his contentions that the record contradicts the prosecutor's statement that D.E. treated her questioning differently and that the record fails to support her statement that D.E. interrupted the court, defendant claims the trial court erred by failing to conduct a sincere and reasoned inquiry into the prosecutor's stated justifications.

As we shall explain, this is not a case where the record contradicts either the prosecutor's explanation for excusing D.E. or the trial court's findings, and, after the prosecutor set forth her justification for excusing D.E., defense counsel elected not to make any further argument. Under these circumstances, we agree with the People that defendant has not demonstrated *Batson/Wheeler* error. (*People v. Armstrong* (2019) 6 Cal.5th 735, 770 (*Armstrong*).) We nevertheless note that the trial court's findings in this case were quite summary. We encourage trial courts to bear in mind that making a clear,

detailed record greatly assists our substantial evidence review on appeal, particularly in cases such as this involving demeanor-related issues that are not discernible on a cold record. (*Id.* at pp. 767–768.)

B. Legal Standard

The standards governing *Batson/Wheeler* claims are well established. Trial courts have broad discretion over jury selection (*People v. Whalen* (2013) 56 Cal.4th 1, 29–30, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 44, fn. 17; *People v. Lenix* (2008) 44 Cal.4th 602, 608 (*Lenix*)), and peremptory challenges, which are at issue here, "are 'designed to be used "for any reason, or no reason at all"'" (*Armstrong, supra,* 6 Cal.5th at p. 765, quoting *People v. Scott* (2015) 61 Cal.4th 363, 387). "But there are limits: Peremptory challenges may not be used to exclude prospective jurors based on group membership such as race or gender. [Citations.] Such use of peremptory challenges violates both a defendant's right to a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution, and his right to equal protection under the Fourteenth Amendment to the United States Constitution." (*Armstrong, supra,* at pp. 765–766.)

Here, defendant bases his claim on both race and gender. Although the People cite *People v. Bonilla* (2007) 41 Cal.4th 313, 344, for the proposition that the California Supreme Court has questioned whether Hispanic women constitute a separate cognizable class, the high court more recently stated it is settled law that "in addition to groups defined by either race *or* gender, groups lying at the intersection of race *and* gender are cognizable under *Wheeler*." (*Armstrong, supra,* 6 Cal.5th at p. 768.)

With respect to jury selection, "'[t]here "is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination."' [Citations.] Under a now familiar three-step process, a defendant [bringing a *Batson/Wheeler* motion] must first 'make out a prima facie case "by showing that the totality of the relevant facts gives rise to an

inference of discriminatory purpose." [Citation.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide … whether the opponent of the strike has proved purposeful racial discrimination."' [Citations.] The defendant's ultimate burden is to demonstrate that 'it was more likely than not that the challenge was improperly motivated.'" (*Armstrong*, *supra*, 6 Cal.5th at p. 766; accord, *People v. Parker* (2017) 2 Cal.5th 1184, 1211; *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158–1159 (*Gutierrez*).)

C. Procedural History

1. Defendant's *Batson/Wheeler* Motion

Following defendant's *Baton/Wheeler* objection, the trial court held a hearing outside the presence of potential jurors. Defendant identified the excusal of a group of three Hispanic men as the basis for his motion. Defense counsel argued, in relevant part:

> "My client is a Hispanic male and I believe it's disproportionate to the number of Hispanic males that are on the panel. Not very many, but, so far, three of them. [¶] … [¶] … Well, at least it's strategic, possibly. But, strategically, I think it does have a discriminatory impact. But that's what's actually, I think, occurring. [¶]… [¶] … The people who are being excluded, I don't see anything indicating from their—other than them being just male—Hispanic males that there was any indication that they couldn't be fair to the prosecution or that they were anti-law enforcement."

2. Prosecutor's Justifications for Excusing D.E.

After the trial court determined that defendant had made out a prima facie case, the prosecutor advanced the following justifications for excusing D.E.:

> "As to [D.E.], he interrupted the Court a number of times. He appeared to be stubborn to me. And in terms of responding to questions he—I noted that he answered questions to the Court in a particular way and, then, he answered questions to [defense counsel] in a particular way and appeared to change his answer, which was a concern to me. He's also unmarried, with no children."

3. Trial Court's Ruling

Defendant declined the opportunity to respond to the prosecutor's justifications and the trial court denied the *Batson/Wheeler* motion as follows:

> "The Court finds the challenge in this case has been proper. It establishes that peremptory challenges were exercised for reasons other than [individual] or group bias. There wasn't a match for group prejudice. This explanation provided by the People does not rise to the level of a for cause challenge. It must be based on—it has been based on juror characteristic other than race or gender and proper explanation has been satisfactory for the Court and not pretextual.
>
> "Jurors in this case and I believe based on what [the prosecutor] has indicated to me, without putting words in her mouth, is that she's exercised these peremptories on hunches. Some, perhaps, may have been arbitrary, however, it doesn't rise to the level of impermissible group bias. The motion is, therefore, denied."

D. Analysis

1. Standard of Review at Third Step

The trial court in this case found that defendant made a prima facie showing of group bias at the first step of the *Batson/Wheeler* analysis and, therefore, we proceed to the third step.[6] (*People v. Smith* (2018) 4 Cal.5th 1134, 1147; accord, *People v. Melendez* (2016) 2 Cal.5th 1, 14–15.) As previously stated, "[i]n order to prevail, the movant must show it was '"more likely than not that the challenge was improperly motivated."' [Citation.] This portion of the *Batson/Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness. [Citation.] At this third step, the credibility of the explanation becomes pertinent. To assess credibility, the court may consider, '"among other factors, the prosecutor's demeanor; … how

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[6] At the second step, the "process does not demand an explanation that is persuasive, or even plausible." (*Purkett v. Elem* (1995) 514 U.S. 765, 768; accord, *Gutierrez, supra*, 2 Cal.5th at p. 1168.) "'Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" (*Purkett v. Elem, supra*, at p. 768.) Here, the prosecutor's stated justification is facially neutral and defendant does not contend otherwise.

reasonable, or how improbable, the explanations are; and ... whether the proffered rationale has some basis in accepted trial strategy.'" [Citations.] To satisfy [himself] that an explanation is genuine, the presiding judge must make 'a sincere and reasoned attempt' to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, [his] knowledge of trial techniques, and [his] observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges. [Citation.] Justifications that are 'implausible or fantastic ... may (and probably will) be found to be pretexts for purposeful discrimination.' [Citation.] We recognize that the trial court enjoys a relative advantage vis-à-vis reviewing courts, for it draws on its contemporaneous observations when assessing a prosecutor's credibility." (*Gutierrez*, s*upra*, 2 Cal.5th at pp. 1158–1159; accord, *Lenix*, *supra*, 44 Cal.4th at pp. 612–613.)

On appeal, "[w]e review a trial court's determination regarding the sufficiency of tendered justifications with '"great restraint."' [Citation.] We presume an advocate's use of peremptory challenges occurs in a constitutional manner. [Citation.] When a reviewing court addresses the trial court's ruling on a *Batson/Wheeler* motion, it ordinarily reviews the issue for substantial evidence. [Citation.] [However, a] trial court's conclusions are entitled to deference only when the court made a 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.' [Citation.] What courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual. '[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.… If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.'" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159; accord, *Lenix*, *supra*, 44 Cal.4th at pp. 613–614; *People v. Silva* (2001) 25 Cal.4th 345, 385–386.)

2. No Error

At the outset, we note that in his opening brief, defendant mischaracterized, in part, the prosecutor's justifications for excusing D.E. Defendant asserted that although the prosecutor did not ask D.E. any questions, she nevertheless stated he responded differently to her questions. He also asserted that the prosecutor "did not raise the objection of lack of children regarding [D.E.] and thus such a reason cannot be relied upon on appeal." As defendant subsequently conceded in his reply brief, the prosecutor did not state that D.E. responded differently to *her* questions and she in fact identified D.E.'s lack of children as an issue, but he argues that the latter "justification is suspicious because it was not the principal reason cited." We observe, however, that where, as here, there are multiple justifications given for the excusal of a juror, one is necessarily first, one is necessarily last and the remainder necessarily lie in between. We are unable to discern any basis in the record for casting suspicion on the prosecutor's justifications by virtue of their order.

a. Demeanor—Related Justifications

The prosecutor identified five grounds for excusing D.E.: he interrupted the court, he appeared stubborn, he answered the court's and defense counsel's questions in a particular manner, he appeared to change his answer, and he was unmarried with no children. The first four grounds articulated find no express support in the record, but neither does the record contradict them. We would not expect stubbornness or a particular manner in which a juror answers questions to be reflected in the record. Interruptions and changes to answers might be reflected in a given record, but we cannot say this will always be so, as the prosecutor's observation or interpretation may be directly informed by body language or other unrecorded subtleties.

Where a prosecutor relies on demeanor and other factors not apparent on a cold record to excuse potential jurors, the trial court's rulings "are particularly difficult to second guess. Only the trial court is in a position to observe these matters. The court can

hear the juror's tone and inflection and see whether a juror hesitates or struggles with particular answers in a way the record may never reveal. [Citation.] Because the 'trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes[,] … "these determinations of credibility and demeanor lie peculiarly within a trial judge's province," and "in the absence of exceptional circumstances, we [will] defer to the trial court."'" (*Armstrong*, *supra*, 6 Cal.5th at p. 770.)

Notwithstanding defendant's position to the contrary, the trial court's failure to make a more detailed record here does not compel departure from the usual deference on review. In *People v. Jones*, the trial court listened to the prosecutor's statement of justification, offered defense counsel an opportunity to respond and, after defense counsel declined to comment further, denied the defendant's *Batson/Wheeler* motion without further discussion. (*People v. Jones* (2011) 51 Cal.4th 346, 361.) The California Supreme Court rejected the defendant's argument that this bare ruling was not entitled to deference and it concluded that the trial court was not required to do more than it did. (*Ibid.*) The high court pointed out that "the [trial] 'court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty.'" (*Ibid.*, quoting *People v. Lewis* (2008) 43 Cal.4th 415, 471.)

"'[T]he prosecutor's demeanor observations, even if not explicitly confirmed by the record, are a permissible race-neutral ground for peremptory excusal, especially when they were not disputed in the trial court.'" (*People v. Hardy* (2018) 5 Cal.5th 56, 82, quoting *People v. Mai* (2013) 57 Cal.4th 986, 1052.) The California Supreme Court has observed that defense counsel's failure to respond to the prosecutor's statement of reasons at the trial court's invitation is "significant." (*People v. Hardy*, *supra*, at p. 80;

accord, *People v. Mai*, *supra*, at p. 1052; *People v. Jones*, *supra*, 51 Cal.4th at p. 361.) This is so because as the moving party, the defendant bears the burden of persuasion and the failure to respond to the prosecutor's stated justifications deprives the prosecutor of the opportunity to explain further or otherwise defend those justifications, deprives the trial court of the opportunity to view the justifications advanced through the lens of the defendant's observations and arguments, and, on review, deprives the appellate court of a more fully developed record. (*People v. Hardy*, *supra*, at pp. 80–81.) In this case, after defense counsel set forth the grounds for his *Batson/Wheeler* motion, the prosecutor offered her justifications for excusing D.E. Defense counsel offered no further comment, which suggests that the prosecutor's demeanor-related observations of D.E. were not off mark. (*People v. Jones*, *supra*, at p. 361; *People v. Mai*, *supra*, at p. 1052 & fn. 27.)

Defendant cites *Snyder v. Louisiana* (2008) 552 U.S. 472 and *People v. Silva*, *supra*, 25 Cal.4th 345 in support of his argument that error may be found where the record does not support the justifications advanced by the prosecutor, but both cases are distinguishable from the facts at issue here. In *Snyder v. Louisiana*, the prosecutor excused a student teacher based, in part, on a scheduling conflict, but on review, the United States Supreme Court found that justification was suspicious given the assurance by the potential juror's dean that serving on the jury should not present a problem and the lack of any indication in the record that the potential juror was further troubled after the dean's response. (*Snyder v. Louisiana*, *supra*, at pp. 479–483.)

In *People v. Silva*, the California Supreme Court found no support in the record for the prosecutor's representation that the excused juror "would be reluctant to return a death verdict [and] that he was 'an extremely aggressive person.'" (*People v. Silva*, *supra*, 25 Cal.4th at p. 385.) In contrast with those cases, the record here does not "plainly" contradict the justifications advanced by the prosecutor. (*Armstrong*, *supra*, 6 Cal.5th at p. 777.)

We have carefully reviewed the record and do not find exceptional circumstances justifying departure from the usual deference afforded the trial court. As previously stated, defendant does not argue that the prosecutor's justifications lacked facial neutrality, and "even a trivial reason, a hunch, or an arbitrary exclusion, if genuine and neutral, will suffice." (*People v. Douglas* (2018) 22 Cal.App.5th 1162, 1170, citing *People v. Hamilton* (2009) 45 Cal.4th 863, 901; accord, *People v. O'Malley* (2016) 62 Cal.4th 944, 975; see *People v. Hensley* (2014) 59 Cal.4th 788, 803 ["Rigid jurors who appear emotionally detached and terse may be divisive during deliberations. They may not perform well as open-minded jurors willing and able to articulate their views and persuade others."]; *People v. Trinh* (2014) 59 Cal.4th 216, 242 [childless status one of multiple factors in excusing prospective juror].)

b. Statistical Evidence

Nor does this case involve statistics that are troubling.[7] (*People v. Jones, supra,* 51 Cal.4th at p. 362.) Although an express finding was not made, the trial court's comments indicate there were at least 90 jurors in the venire panel, from which 20 prospective jurors were selected for voir dire. After defendant made his *Batson/Wheeler* motion and identified Hispanic males as the group being targeted, the trial court asked counsel if he was arguing there were few Hispanic male jurors on the panel and commented, "There is a high percentage of Hispanic males on the panel." Moreover, the record indicates that D.E. was the third Hispanic male juror excused on the prosecutor's sixth peremptory challenge. We are cognizant that "[e]xcluding by peremptory challenge even 'a single juror on the basis of race or ethnicity is an error of constitutional magnitude'" (*Gutierrez, supra,* 2 Cal.5th at p. 1172), but we disagree with defendant that

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[7] We disagree with defendant's assertion, in reply, that the People's entire proportionality argument "should be disregarded because it relates to the first stage of the analysis." While "the statistical showing that motivated the finding of a prima facie case is not dispositive at [the] third stage," it is nevertheless relevant in evaluating the totality of the circumstances. (*People v. Smith, supra,* 4 Cal.5th at p. 1147; accord, *People v. Jones, supra,* 51 Cal.4th at p. 362.)

the facts in this case evidence a pattern of impermissible exclusion of Hispanic male jurors (*People v. Bell* (2007) 40 Cal.4th 582, 598 ["'As a practical matter … the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion.'"], disapproved of on another ground by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13; accord, *People v. Parker*, *supra*, 2 Cal.5th at p. 1212; *People v. Woodruff* (2018) 5 Cal.5th 697, 750).

c. Comparative Juror Analysis

Comparative juror analysis evidence is also "'not necessarily dispositive, but it is [another] form of relevant circumstantial evidence.'" (*People v. Hardy*, *supra*, 5 Cal.5th at p. 77, quoting *People v. Melendez*, *supra*, 2 Cal.5th at p. 15; accord, *People v. Smith*, *supra*, 4 Cal.5th at pp. 1147–1148.) "'[E]vidence of comparative juror analysis *must* be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons.'" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1174, quoting *Lenix*, *supra*, 44 Cal.4th at p. 622.) Here, however, defendant did not advance a comparative analysis argument in the trial court nor did he advance one in his opening brief. After the People pointed out that under these circumstances, it is unnecessary to address the issue, defendant identified, in reply, Juror No. 349035 and Juror No. 343820 for purposes of conducting a comparative analysis review.

"It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party." (*People v. Tully* (2012) 54 Cal.4th 952, 1075; accord, *People v. Thompson* (2010) 49 Cal.4th 79, 110, fn. 13; *People v. Dixon* (2007) 153 Cal.App.4th 985, 996.) Given that this argument was raised for the first time in the reply brief, it is waived.

We nevertheless observe that "[c]omparative juror analysis has force 'when the compared jurors have expressed "a substantially similar *combination* of responses," in all material respects, to the jurors excused.'" (*Armstrong*, *supra*, 6 Cal.5th at p. 780, quoting

People v. Winbush (2017) 2 Cal.5th 402, 443.) The only similarity arguable on this record is that the two seated jurors, one of whom was female and one of whom was male, also had no children. (See *People v. O'Malley*, *supra*, 62 Cal.4th at p. 976 [where comparative analysis not conducted in trial court, "'appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable'"].)

d. Conclusion

We find nothing in the record contradicting the prosecutor's stated justifications, and as to the fifth justification relating to D.E.'s lack of any children, prior to excusing D.E., the prosecutor exercised peremptory challenges excusing other jurors who did not have children. That ultimately two jurors without children remained on the jury does not alter our conclusion. There is no indication in the record that either remaining juror was materially similar to D.E., and it is well recognized that jury selection is a fluid process and the balance is complex. (*Armstrong*, *supra*, 6 Cal.5th at p. 780; accord, *People v. Winbush*, *supra*, 2 Cal.5th at p. 442.) "'[P]otential jurors are not products of a set of cookie cutters.' [Citation.] Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*Lenix*, *supra*, 44 Cal.4th at p. 624; accord, *Armstrong*, *supra*, at p. 781; *People v. Winbush*, *supra*, at p. 442.)

It is incumbent on the prosecutor and the trial court to ensure a record that is sufficient to permit us to defer to the court's express or implied findings on demeanor. (*Lenix*, *supra*, 44 Cal.4th at pp. 623–625; *People v. Silva*, *supra*, 25 Cal.4th at p. 385; *People v. Long* (2010) 189 Cal.App.4th 826, 848.) This is not a case, however, where the prosecutor's proffered justifications are inherently implausible or, *critically*, contradicted

by the record. (*Armstrong*, *supra*, 6 Cal.5th at p. 777 ["We departed from that stance of deference in *Gutierrez*, but only because the proffered reasons lacked inherent plausibility or were contradicted by the record, and the trial court did not ask the prosecutor to elaborate."]; *People v. Long*, *supra*, at p. 848 ["We are unable to extend normal deference to the trial court's implied finding on this point when another stated reason, though pronounced 'legitimate' by the trial court, was demonstrably inaccurate."].) To the contrary, as previously discussed, four of the five justifications advanced are not of the type readily apparent from a cold record and defense counsel offered no response, which suggests there was merit to the prosecutor's demeanor-related observations and they were not pretextual. Accordingly, for the reasons stated, we find defendant fails to meet his burden of demonstrating error. (*Armstrong*, *supra*, at p. 766.)

II. Substantial Evidence Challenge to Burglary Special Circumstance Finding

A. Background

In count 8, defendant was charged with committing a lewd or lascivious act with a minor under the age of 14 years with the special circumstance allegation that the crime occurred during the commission of a burglary. (§§ 288, subd. (a), 667.61, subds. (c)(8), (e)(2).) The jury convicted defendant of the charge, which was based on the last incident at Doe's house, and found the special circumstance allegation true, resulting in a mandatory sentence of 25 years to life under section 667.61, subdivision (j)(2), known as the "One Strike" law. (*People v. Acosta* (2002) 29 Cal.4th 105, 109.)

Defendant challenges the jury's special circumstance finding as unsupported by substantial evidence that he committed burglary. Although he concedes that Doe was incapable of consenting to sexual acts under the law and that his theory is "novel," he argues that her consent to his entry into the house for the purpose of engaging in the sex act vitiates the burglary finding, precluding application of the One Strike law. He also argues, as we interpret it, that under the circumstances of this case, he falls outside the spirit of the One Strike law, which "is 'to ensure serious and dangerous sex offenders

would receive lengthy prison sentences upon their first conviction,' 'where the nature or method of the sex offense "place[d] the victim in a position of elevated vulnerability."'" (See *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1296.)

Relying on *People v. Sigur* (2015) 238 Cal.App.4th 656 (*Sigur*), the People respond that as a minor, Doe did not have authority to consent to defendant's entry for the purpose of committing a felony. They also point out that "[t]he quantum of evidence required to prove the elements of burglary is the same regardless of the penalty" and that, notwithstanding her complicity in the crime, the victim was vulnerable based on her age. We agree.

B. Standard of Review

"The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense" (*Carella v. California* (1989) 491 U.S. 263, 265, citing *In re Winship* (1970) 397 U.S. 358, 364), and the verdict must be supported by substantial evidence (*People v. Zamudio* (2008) 43 Cal.4th 327, 357). On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence "'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Zamudio*, *supra*, at p. 357.)

"In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357.) "'[I]t is the jury, not the appellate court which must be convinced of the defendant's guilt.'" (*People v. Nguyen*, *supra*, 61 Cal.4th at pp. 1055–1056.) "A

reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio*, *supra*, at p. 357.) However, "speculation, supposition and suspicion are patently insufficient to support an inference of fact." (*People v. Franklin* (2016) 248 Cal.App.4th 938, 951; accord, *People v. Marshall* (1997) 15 Cal.4th 1, 36; *People v. Xiong* (2013) 215 Cal.App.4th 1259, 1268.)

C. Analysis

1. Commission of Burglary

"The purpose of the One Strike law is to provide life sentences for aggravated sex offenders, even if they do not have prior convictions." (*People v. Acosta*, *supra*, 29 Cal.4th at p. 127.) The statute "'sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes' when a defendant commits one of those crimes under specified circumstances." (*Id.* at p. 118.) In this case, the jury found that defendant committed a lewd or lascivious act in violation of section 288, subdivision (a), during the commission of a burglary in violation of section 459. (§ 667.61, subd. (e)(2).)

"The crime of burglary consists of an act—unlawful entry—accompanied by the 'intent to commit grand or petit larceny or any felony.' (§ 459.) One may b[e] liable for burglary upon entry with the requisite intent to commit a felony or a theft (whether felony or misdemeanor), regardless of whether the felony or theft committed is different from that contemplated at the time of entry, or whether any felony or theft actually is committed." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042, fn. omitted; accord, *People v. Harris* (2013) 57 Cal.4th 804, 842; *Magness v. Superior Court* (2012) 54 Cal.4th 270, 273.) Consent to enter is an affirmative defense and, unsurprisingly, it was not raised in the trial court in this case. (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1304; accord, *Sigur*, *supra*, 238 Cal.App.4th 656.)

In *Sigur*, cited by the People, the Court of Appeal considered whether a minor may consent to entry for the purpose of engaging in felonious sexual conduct. (*Sigur*, *supra*,

238 Cal.App.4th at p. 668.) As in this case, the defendant in *Sigur* was an adult in a secret sexual relationship with a minor. (*Id.* at pp. 661–662.) In relevant part, the defendant snuck into the home the minor shared with her mother and grandmother on numerous occasions to engage in sexual activity with her. (*Id.* at p. 662.) He was subsequently convicted of multiple counts of burglary, among other offenses (*id.* at p. 659) and, on appeal, he argued there was substantial evidence that the minor consented to his entry, knowing of his intent to engage in sexual activity with her (*id.* at p. 666).

On review, the Court of Appeal surveyed the law with respect to consent to entry and then considered whether a minor has the authority to consent to entry. (*Sigur*, *supra*, 238 Cal.App.4th at pp. 668–672.) The court concluded that "[w]hen the defendant does not have an unconditional possessory right to enter as an occupant of the premises, a defense of consent to enter the premises for the purposes of engaging in felonious sexual conduct with a minor requires one of the following: (1) the minor has a possessory interest in the premises coequal to the parent or other adult owner/occupant and expressly and clearly invited the defendant to enter so the defendant could engage in sexual conduct with the minor; (2) a parent or other adult who has a possessory interest in the premises expressly and clearly gave the defendant permission to enter for the purpose of engaging in sexual conduct with the minor; or (3) the minor expressly and clearly gave the defendant permission to enter for the purpose of engaging in sexual conduct with the minor, the minor had been given permission by the parent or other person with a possessory interest to allow entry for such purpose, and defendant knew that the minor had been given such permission." (*Id.* at pp. 672–673.)

Here, although defendant characterizes consent to enter by a minor as an unsettled area of law and he dismisses *Sigur* as "simply [serving] to characterize burglary as an offense protecting the possessory interest," he cites no authority supporting the proposition that Doe had the authority to consent to his entry for the purpose of engaging in sexual activity with her, and we find *Sigur* well reasoned and instructive. "[A] minor's

authority over the family home derives from the parents' authority as the primary legal possessors." (*Sigur, supra,* 238 Cal.App.4th at p. 671, citing *People v. Jacobs* (1987) 43 Cal.3d 472, 483.) As in *Sigur*, "defendant invaded [Doe's] mother's possessory interest in the home and the evidence did not show that [Doe] had the authority to allow defendant into the home to engage in felonious sexual relations with her." (*Sigur, supra,* at p. 674.) Also as in *Sigur*, defendant and Doe kept their relationship secret from her mother and, as evidenced by their text messages planning to meet "to do something" during the limited time Doe's mother was out of the house, defendant was well aware that Doe lacked the authority to consent to his entry for the purpose of engaging in sexual activity with her. (*Ibid.*)

2. Conduct Not Outside Spirit of One Strike Law

Relatedly, defendant also argues that imposition of criminal liability under these circumstances conflicts with the legislative purpose underlying the One Strike law, although he concedes the argument is novel and the textual analysis favors the People. Defendant argues in part that the statute is ambiguous because "there is an unsettled question whether a minor can consent to entry," thereby negating the burglary. We already found this argument without merit in the preceding subsection, however. As discussed, the elements of burglary are well established (*People v. Montoya*, *supra*, 7 Cal.4th at pp. 1041–1042; *Sigur*, *supra,* 238 Cal.App.4th at p. 667), defendant entered Doe's residence without her mother's knowledge or permission and with the intent to engage in felonious sexual activity and, under the law, Doe could not consent to his entry for this purpose or to the underlying sexual activity.

The principles governing statutory interpretation are well established. The reviewing court's "'fundamental task … is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.]' [Citation.] 'Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and ordinary meaning.' [Citations.] 'If the statutory language is

unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.'" (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1105–1106.) Moreover, "'[t]he power to define crimes and prescribe punishments is a legislative function'" (*People v. Baker* (2018) 20 Cal.App.5th 711, 729), and "'great deference is ordinarily paid to legislation designed to protect children, who all too frequently are helpless victims of sexual offenses" (*ibid.*).

Defendant bears the burden of demonstrating error on appeal and he cites no authority supporting his position. (*People v. Gamache* (2010) 48 Cal.4th 347, 378; *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1523; *People v. Clifton* (1969) 270 Cal.App.2d 860, 862.) He also identifies no ambiguity in the plain language of the statute, a point he concedes, and we do not agree that his conduct falls outside the spirit of the One Strike law. Defendant suggests that Doe's knowledge of his entry and her willingness to engage in sexual activity with him ameliorates her vulnerability as a victim. Not so.

In contrast with subdivision (b), violation of subdivision (a) of section 288 does not require the use of force, violence, duress, menace, or fear; and, notably, it is both an enumerated offense under the One Strike law (§ 667.61, subd. (c)(8)) and a violent felony under the Three Strikes law (§§ 667, subd. (d)(1), 667.5, subd. (c)(6)). Defendant's argument overlooks the critical fact that he entered a residence in which he lacked any possessory interest in order to engage in unlawful sexual intercourse with a 12-year-old child without her mother's knowledge or permission. It is the very fact that Doe was a child incapable of legally consenting to the sex act, or to the entry into her house to commit said act, that criminalizes defendant's conduct and brings the crime within the purview of the One Strike sentencing scheme. We reject defendant's contrary characterization of the matter and conclude that the jury's burglary special circumstance finding is supported by substantial evidence.

III. Admission of Photograph

A. Background

At trial, the prosecutor sought to admit a photograph of defendant, his son, Doe and her mother at Doe's second birthday party for the purpose of demonstrating that defendant knew Doe and knew her age. The prosecutor noted that during the preliminary hearing, defendant took the position he was unaware of Doe's age. Defendant argued the photograph was not probative for the purpose advanced by the prosecutor and he objected to its admission under Evidence Code section 352. The trial court overruled the objection and admitted the photograph.

On appeal, defendant argues that the photograph had limited relevance because it was cumulative of other evidence and its limited relevance was outweighed by its prejudicial effect. He argues specifically that the admission of the photograph was prejudicial as to the sodomy charge (count 5) because the offense involves a "particularly heinous" specific intent and "[a]ny factor which invoked added sympathy for the victim was likely to invoke rage as to [him]."

The People respond that the years-long familial relationship between Doe and defendant, evidenced by the photograph, was relevant because it explained Doe's vulnerability and "provid[ed] context for her response to the abuse."

We find neither error nor prejudice even if we assume error.

B. Legal Standard

We review a trial court's ruling on the admission or exclusion of evidence for abuse of discretion. (*People v. Kopatz* (2015) 61 Cal.4th 62, 85; *People v. DeHoyos* (2013) 57 Cal.4th 79, 131.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved

in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 390.) "'[W]e review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm.'" (*People v. Zamudio, supra*, 43 Cal.4th at p. 351, fn. 11; accord, *People v. Brooks* (2017) 3 Cal.5th 1, 39.)

C. Analysis

1. Evidence Code Section 352

Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is *substantially* outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Italics added.) However, as the California Supreme Court has explained, "'"'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption '"substantially outweigh"' the probative value of relevant evidence, a section 352 objection should fail. [Citation.] '"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]' [Citation.] [¶] The prejudice that section 352 '"is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" [Citation.]' [Citation.] In other words, evidence should be excluded as unduly prejudicial when it is of such

nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." [Citation.]'" (*People v. Scott* (2011) 52 Cal.4th 452, 490–491; accord, *People v. Tran* (2011) 51 Cal.4th 1040, 1048.)

2. No Error

Doe had just turned 12 years old when defendant, who was then 35 years old, took her and his daughter to the movies, plied them with alcohol afterward, and then had sexual intercourse with Doe while she was intoxicated.[8] Doe's mixed feelings are clear from the record: she testified that while she had no prior sexual experience, she understood what was happening and wanted it to happen; she feared defendant getting into trouble and wanted to protect him; and she feared A.C. losing her father. Doe also minimized any long-term connection to defendant, testifying that prior to going to the movies that night, she saw him very seldom. Although Doe testified that she told defendant she was 12 years old that night at the movie, she also testified that she looked older and defendant thought she was 16 or 17 years old. As well, A.C. testified that on Doe's Facebook page, Doe stated she was over 18 years old. While defendant does not argue that his knowledge of Doe's age is irrelevant, we observe that his knowledge of that fact is directly relevant to the charge of contacting or communicating with a minor with intent to commit a lewd or lascivious act in violation of section 288.3 (count 9) and the charge of arranging to meet a minor for the purpose of engaging in lewd and lascivious behavior in violation of section 288.4 (count 10).

The introduction of the photograph, made through Doe's mother, was brief and demonstrated not only that the families had known each other for a long time, but that

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8 Doe was born in February 2003.

defendant was aware of Doe's age, having known her since at least toddlerhood. The photograph itself is not inflammatory in nature and we are not persuaded there was any substantial likelihood that it would be misused by the jury. (*People v. Scott*, *supra*, 52 Cal.4th at pp. 490–491.) The trial court has broad discretion to admit or exclude relevant evidence and, here, defendant fails to meet his burden of demonstrating that the trial court abused that discretion in this instance. (*People v. Williams* (2013) 58 Cal.4th 197, 270–271.)

3. No Prejudice

Additionally, even if we assume error, it was harmless. As defendant states, state law errors such as this are reviewed under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 837, which requires a determination "whether there is a 'reasonable probability' that a result more favorable to the defendant would have occurred absent the error." (*People v. Aranda* (2012) 55 Cal.4th 342, 354.) In arguing the error was prejudicial, defendant focuses on the sodomy count, pointing out what he describes as the heinous nature of the crime and that the jury convicted him of the lesser included offense of attempted sodomy, perhaps reflecting its doubt as to the charge. We disagree.

Pursuant to CALCRIM No. 1090, the jury was instructed that sodomy requires anal penetration, no matter how slight.[9] Doe testified only that defendant rubbed his penis between her buttocks. She did not remember if his penis touched her anus and she

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9 The trial court instructed the jury as follows: "The defendant is charged in Count 5 with sodomy with a person who was under the age of 14 years and at least ten years younger than the defendant. [¶] … ¶] To prove the defendant is guilty of this crime the People must prove that:

"One, the defendant participated in an act of sodomy with another person.

"And, two, at the time of the act, the other person was under the age of 14 years and was at least ten years younger than the defendant.

"Sodomy is any penetration, no matter how slight, of the anus of one person by the penis of another person. Ejaculation is not required. It is not a defense that the other person may have consented to the act."

testified he did not place his penis inside her anus. During deliberations, the jury asked the court for clarification on penetration as related to sodomy and the court reread CALCRIM No. 1090.

Under these circumstances, the subsequent verdict of attempted sodomy is not surprising, and we do not discern from the record any connection between the verdict and the admission of the photograph. Defendant concedes the strength of the prosecution's case as to defendant's commission of unlawful sex acts with Doe, and we find no reasonable probability that defendant would have obtained a more favorable result had the photograph not been admitted. (*People v. Aranda*, *supra*, 55 Cal.4th at p. 354.)

IV. Sentencing Error

A. Background

Finally, in supplemental briefing, defendant claims that pursuant to section 654, the trial court should have stayed the sentences it imposed on count 1 (administering an intoxicant with the intent to commit a felony), count 9 (contact or communication with a minor with intent to commit a lewd or lascivious act), and count 10 (arranging to meet a minor for the purpose of engaging in lewd or lascivious behavior) given his sentencing on the related sexual offenses.[10] The People concede that the court was required to stay defendant's sentences on counts 9 and 10, but they dispute his entitlement to relief on count 1. For the reasons set forth below, we conclude that the trial court did not err in failing to stay defendant's sentence on count 1 under section 654, but we accept the People's concession of error on counts 9 and 10.

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10 Where, as here, defendant failed to object to his sentence in the trial court, the error may be raised on appeal even in the absence of an objection because a sentence imposed in contravention of section 654 is an unauthorized sentence. (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

B. Legal Standard

Section 654, subdivision (a), provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute "expressly prohibits separate punishment for two crimes based on the same act, but has been interpreted to also preclude multiple punishment for two or more crimes occurring within the same course of conduct pursuant to a single intent." (*People v. Vargas* (2014) 59 Cal.4th 635, 642; accord, *People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).) Determining "[w]hether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry …." (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) "We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single '"intent and objective"' or multiple intents and objectives." (*Ibid.*)

We review the trial court's express or implied factual findings for substantial evidence and its conclusions of law de novo. (*People v. Brents*, *supra*, 53 Cal.4th at p. 618; *People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5; *People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603.) We "affirm the trial court's ruling, if it is supported by substantial evidence, on any valid ground." (*People v. Capistrano* (2014) 59 Cal.4th 830, 886, fn. 14, overruled in part on another ground in *People v. Hardy*, *supra*, 5 Cal.5th at p. 104; accord, *People v. Brents*, *supra*, at p. 618.)

C. Analysis

1. Count 1

a. Background

The factual basis for count 1 was any one of the incidents in which defendant provided Doe with alcohol or marijuana and later engaged in a lewd or lascivious act with her.[11] Defendant was convicted of violating section 222: administering a controlled substance, anesthetic or intoxicating agent with the intent to commit a lewd or lascivious act with a minor under the age of 14 years, in violation of section 288, subdivision (a).[12]

During the sentencing hearing, the court selected concurrent sentences after commenting that the offenses were committed separately, at different times with different intents, and with the opportunity for reflection. (Cal. Rules of Court, rules 4.409, 4.424, 4.425.) In this appeal, defendant argues that there is no evidence he furnished alcohol or drugs to Doe for any purpose other than to facilitate the related sexual offenses and he dismisses "[t]he court's reference to opportunity for reflection [as] inapplicable for purposes of sentencing."[13] The People contend that defendant furnished alcohol and

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[11] Defendant provided alcohol and marijuana to Doe on more than one occasion, and therefore, the court instructed the jury on unanimity pursuant to CALCRIM No. 3500. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 ["[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act."].)

[12] Section 222 provides: "Every person guilty of administering to another any chloroform, ether, laudanum, or any controlled substance, anaesthetic, or intoxicating agent, with intent thereby to enable or assist himself or herself or any other person to commit a felony, is guilty of a felony punishable by imprisonment in the state prison for 16 months, or two or three years."

[13] We reject defendant's second argument as contrary to law and unsupported by the authority cited. Courts have long considered the extent of a defendant's opportunity to reflect in the context of determining whether section 654 should apply to a course of conduct. (E.g., *People v. Jimenez* (2019) 32 Cal.App.5th 409, 424; *People v. Louie* (2012) 203 Cal.App.4th 388, 399; *People v. Lopez* (2011) 198 Cal.App.4th 698, 717–718; *People v. Gaio* (2000) 81 Cal.App.4th 919, 935; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253–1256.) Furthermore, the section of *Harrison* cited by defendant in support of his argument pertains to the defendant's challenge to the *number* of his convictions, not his challenge to punishment under section 654. (*Harrison*, *supra*, 48 Cal.3d at pp. 332–333 [criticizing *People v. Hammon* (1987) 191

drugs to Doe and his daughter, evidencing the additional criminal objective of enjoying alcohol and drugs with minors. Alternatively, the People contend that even if defendant acted with a single criminal objective, he engaged in a divisible course of conduct. In reply, defendant argues that his act of administering alcohol or drugs to Doe was indivisible from his commission of the lewd or lascivious act because it was incidental to, or the means of facilitating, the sex offense.

b. No Error

1) Multiple Objectives

This case does not involve a single physical act and, therefore, we focus on the second step of the analysis: whether, as defendant argues, the crimes were "'a course of conduct deemed to be indivisible in time.'" (See *People v. Corpening*, *supra*, 2 Cal.5th at p. 311.) Generally, """[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."""" (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 885, quoting *People v. Rodriguez* (2009) 47 Cal.4th 501, 507.) However, "'[b]ecause of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an "act or omission," there can be no universal construction which directs the proper application of section 654 in every instance.'" (*People v. Hicks* (2017) 17 Cal.App.5th 496, 514, quoting *People v. Beamon* (1973) 8 Cal.3d 625, 636; accord, *Harrison*, *supra*, 48 Cal.3d at p. 336.) Section 654 "is intended to ensure that [the] defendant is punished 'commensurate with his culpability'" (*Harrison*, *supra*, 48 Cal.3d at p. 335), and the California Supreme Court has cautioned that "a 'broad and amorphous' view of the single

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Cal.App.3d 1084, 1099, for its reliance on irrelevant factors, including the opportunity to reflect, to determine when a new sex offense is complete].)

'intent' or 'objective' needed to trigger the statute would impermissibly 'reward the defendant who has the greater criminal ambition with a lesser punishment'" (*id.* at pp. 335–336, quoting *People v. Perez*, *supra*, 23 Cal.3d at p. 552).

"'If [the defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Porter* (1987) 194 Cal.App.3d 34, 38, quoting *People v. Beamon*, *supra*, 8 Cal.3d at p. 639; accord, *Harrison*, *supra*, 48 Cal.3d at p. 335; *People v. Tom* (2018) 22 Cal.App.5th 250, 260.) "Whether the defendant maintained multiple criminal objectives is determined from all the circumstances and is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it." (*People v. Porter*, *supra*, at p. 38, citing *People v. Goodall* (1982) 131 Cal.App.3d 129, 148; accord, *People v. Tom*, *supra*, at p. 260.) "'The temporal proximity of the two offenses is insufficient by itself to establish that they were incident to a single objective.'" (*People v. Jackson* (2016) 1 Cal.5th 269, 354, quoting *People v. Capistrano*, *supra*, 59 Cal.4th at p. 887; accord, *Harrison*, *supra*, at p. 335.)

Defendant was convicted of administering an intoxicant with the intent to commit a lewd or lascivious act with a minor, and the trial court impliedly determined he harbored multiple criminal objectives for the purpose of determining whether to apply section 654. (*People v. Islas* (2012) 210 Cal.App.4th 116, 129, citing *People v. Osband* (1996) 13 Cal.4th 622, 730–731.) The evidence shows that in all three incidents during which defendant furnished alcohol or marijuana to Doe and then later engaged in sexual activity with her, he also simultaneously furnished those substances to A.C., his minor daughter. The two girls, who were friends, consumed the alcohol and the marijuana together while "hanging out" with defendant, and there is no suggestion in the record that defendant engaged in any sexual conduct with his daughter. We conclude that from this

evidence, the trial court could have reasonably inferred multiple criminal objectives: furnishing the minor girls with alcohol and drugs in order to party with them and also to lower Doe's inhibitions and arouse her for the purpose of later engaging in sexual activity.[14] Accordingly, we reject defendant's contention that he was engaged in an indivisible course of conduct pursuant to a single criminal objective.

2) Preparatory Misconduct

Courts have also recognized that "[i]n cases involving sex offenses, courts have found that '[e]ven where the defendant has but one objective—sexual gratification—section 654 will not apply unless the crimes were either incidental to or the means by which another crime was accomplished. [Citations.] [¶] … [S]ection 654 does not apply to sexual misconduct that is "preparatory" in the general sense that it is designed to sexually arouse the perpetrator or the victim.'" (*People v. Hicks*, *supra*, 17 Cal.App.5th at p. 514, quoting *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006; accord, *People v. Madera* (1991) 231 Cal.App.3d 845, 855.)

Applying this principle, defendant's act of supplying alcohol and marijuana to Doe, while directed at a broader objective of sexual gratification, was preparatory in nature. We find *People v. Hicks*, not cited by the parties, analogous. The defendant in *People v. Hicks* was charged with human trafficking, unlawful sexual intercourse and furnishing a controlled substance to a minor. (*People v. Hicks*, *supra*, 17 Cal.App.5th at p. 515.) He advanced materially the same argument as defendant does here, which the Court of Appeal rejected, explaining, "Defendant's own argument defeats his claim with respect to the furnishing of illegal drugs. Defendant asserts the furnishing of the drugs

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14 Unlike texting a minor, discussed *post*, furnishing alcohol or marijuana to a minor is criminalized under the law, separate and apart from furnishing it for the purpose of committing a felony in violation of section 222. (See Bus. & Prof. Code, § 25658, subd. (a); Health & Saf. Code, §§ 11007, 11054, subd. (d)(13), 11361; see also *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 ["'"The public takes an extremely grave view of adults who furnish narcotics to minors."'"].)

was part of his objective which was 'sexual in nature.' We interpret that as meaning the drugs were meant to arouse the victims, and was '"preparatory"' in nature. [Citation.] Such conduct is not subject to section 654." (*Ibid.*, quoting *People v. Alvarez, supra*, 178 Cal.App.4th at p. 1006.)

Here, as discussed, defendant supplied Doe and his daughter with alcohol and marijuana, which they consumed together over the course of an evening. Although defendant committed the lewd or lascivious act with Doe later the same night, we decline to characterize his act of furnishing alcohol and marijuana as *merely* incidental to, or the means that *directly* facilitated, the subsequent lewd or lascivious act. (See *People v. Greer* (1947) 30 Cal.2d 589, 604 [removal of clothing facilitated the rape], overruled on another ground and disapproval on another ground also recognized by *People v. Fields* (1996) 13 Cal.4th 289, 306, fn. 4, 308, fn. 6; *People v. Madera*, *supra*, 231 Cal.App.3d at p. 855 [rubbing victim's penis prior to commission of oral copulation or sodomy not merely incidental to or facilitative of subsequent sex acts].) Rather, the alcohol and drugs were preparatory in that they resulted in the arousal of the victim and lowered her resistance to the eventual sexual contact.

2. Counts 9 and 10

Counts 8, 9 and 10 relate to the last charged incident of sexual contact between Doe and defendant, which occurred at Doe's house when her mother was gone for a doctor's appointment. Counts 9 and 10 are based on the text messages defendant and Doe exchanged and count 8 is based on the act of intercourse that subsequently occurred.[15]

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[15] In count 9, defendant was charged with violating section 288.3, subdivision (a), which provides: "Every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section 207, 209, 261, 264.1, 273a, 286, 287, 288, 288.2, 289, 311.1, 311.2, 311.4 or 311.11, or former Section 288a, involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense."

The People concede that the trial court erred in failing to stay the sentences on counts 9 and 10. We have reviewed the text messages between defendant and Doe, and the messages were directed at arranging for defendant to go to Doe's house in her mother's absence so the two could engage in sexual activity. Therefore, we agree with the parties that the evidence in the record is not sufficient to support the trial court's implied finding that in contacting or communicating with Doe (count 9) and in arranging to meet with Doe (count 10), defendant harbored a criminal intent separate from that underlying his commission of the lewd or lascivious act charged in count 8. (*People v. Medelez* (2016) 2 Cal.App.5th 659, 663.) Moreover, as the text messages were merely incidental to, and directly facilitated, the subsequent sexual contact, defendant's act of texting Doe also cannot be fairly characterized as preparatory in nature. (*People v. Hicks, supra*, 17 Cal.App.5th at p. 515.)

We therefore modify defendant's sentence to stay the sentences on counts 9 and 10 under section 654. (*People v. Medelez, supra*, 2 Cal.App.5th at p. 664, citing *People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.)

DISPOSITION

The judgment is modified to stay the sentences imposed on counts 9 and 10 pursuant to Penal Code section 654. As modified, the judgment is affirmed. The trial court is directed to correct its sentencing hearing minute order to reflect that defendant was sentenced to 25 years to life pursuant to Penal Code section 667.61,

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In count 10, defendant was charged with violating section 288.4, subdivision (b), which provides: "Every person described in paragraph (1) of subdivision (a) who goes to the arranged meeting place at or about the arranged time, shall be punished by imprisonment in the state prison for two, three, or four years." Paragraph (1), subdivision (a) of section 288.4 in turn provides: "Every person who, motivated by an unnatural or abnormal sexual interest in children, arranges a meeting with a minor or a person he or she believes to be a minor for the purpose of exposing his or her genitals or pubic or rectal area, having the child expose his or her genitals or pubic or rectal area, or engaging in lewd or lascivious behavior, shall be punished by a fine not exceeding five thousand dollars ($5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment."

subdivision (j)(2), and to prepare an amended abstract of judgment reflecting (1) the modification to the sentences on counts 9 and 10 pursuant to Penal Code section 654 and (2) the imposition of the sentence of 25 years to life on count 8 pursuant to Penal Code section 667.61, subdivision (j)(2). The trial court shall forward a certified copy of the amended abstract of judgment to the appropriate authorities.

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MEEHAN, J.

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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SMITH, J.